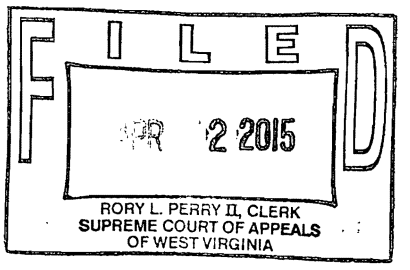
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Estate of Luigi Bossio, also known as Louis Bossio, Defendant Below, Petitioner

vs.) No. 14-1328

Bernard V. Bossio, Plaintiff Below, Respondent

AND

Sam Bossio, Defendant Below, Petitioner

vs.) No. 14-1329

Bernard V. Bossio, Plaintiff Below, Respondent

THE ESTATE OF LUIGI BOSSIO a.k.a. LOUIS BOSSIO PETITIONER'S BRIEF

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2) The Circuit Court erred or abused its discretion in holding that Bernie Bossio proved at trial that a 1982 Stock Purchase Agreement existed, was executed by the parties, and subsequently lost.

3) The Circuit Court erred or abused its discretion in holding that the 1990 Stock Purchase Agreement modified or removed a provision in the 1982 Stock Purchase Agreement thereby no longer requiring that a buy-sell agreement between the parties terminated upon the cancellation of life insurance policies on Bossio Enterprises, Inc., shareholders.

4) The Circuit Court erred or abused its discretion in holding that the 1982 Stock Purchase Agreement or the 1990 Stock Purchase Agreement, or both, did not terminate upon the cancellation of life insurance policies in the 1990s due to a nonpayment of premiums.

III. STATEMENT OF THE CASE

This case involves whether a purported buy-sell agreement ever existed, was ever executed, and whether it remains in effect requiring the Estate of Louis Bossio a.k.a. Louis Bossio (the Petitioner) to sell his shares in Bossio Enterprises, Inc. (Corporation) to the Respondent, Bernard V. Bossio.

In 1979, the Corporation was formed and has been owned since its inception by Louis Bossio and his sons, the Respondent and Samuel Bossio (collectively the Shareholders). Each Shareholder owned one-third (1/3) of the outstanding stock in the Corporation. On September 11, 2007, Louis Bossio passed away. The Estate of Louis Bossio is an open and pending estate in Monongalia County, West Virginia. Accordingly, the estate currently owns Louis Bossio's one-third (1/3) interest in the Corporation.

The Respondent alleges that the Shareholders agreed that, upon the death of a

Shareholder, the decedent's shares would be purchased by the Corporation with the proceeds of life insurance policies that it would maintain on each Shareholder. The Respondent states that a 1982 Stock Purchase Agreement (the 1982 Agreement), entered into by the Shareholders required the buyout of a deceased Shareholders' stock in the Corporation.

The Petitioner alleges that Section 12 of the 1982 Agreement (the termination clause) provides that the 1982 Agreement would terminate, including any buy-sell agreement, upon the termination of mandatory life insurance policies on the Shareholders. The parties agree that the life insurance policies were cancelled for failure to pay the policy premiums in the 1990's. Therefore, the Petitioner alleges that any buy-sell agreement in the 1982 Agreement terminated when the life insurance was cancelled. Accordingly, the Petitioner argues it should not be forced to redeem Louis Bossio's shares of the Corporation.

The Respondent argues that in 1990 the Shareholders entered into a new stock purchase agreement (the 1990 Agreement) wherein the Corporation had the option to purchase life insurance on the lives of the Shareholders for purposes of the purported buy-sell agreement. However, to date, the Respondent has not produced a copy, either signed or unsigned, of the 1990 Stock Purchase Agreement.

On March 4, 2014, the parties appeared before the Monongalia County Circuit Court (Circuit Court) for a bench trial on the issues. On September 5, 2014, the Circuit Court entered a Trial/Judgment Opinion Order where it found that the Petitioner proved that the parties intended to enter into an agreement whereupon the death of one of the Shareholders of the Corporation it would purchase the stock of the deceased

Shareholder. Additionally, the Circuit Court found that the 1982 Agreement was executed and remained in effect until the life insurance policies lapsed from failure to pay the premiums. The Circuit Court further found that the 1982 Agreement was revised in the 1990 Agreement. The terms of the 1990 Agreement were identical to the 1982 Agreement with the exception of the requirement that the Corporation purchase the policies of life insurance on the life of each Shareholder. Accordingly, the Circuit Court found that the Estate of Louis Bossio was required to sell its shares to the Corporation.

IV. STATEMENT OF FACTS

In 1976, though working full time at the Morgan Shirt Corporation, Louis and Emilia Bossio undertook the operation of a pizzeria. *Appendix page 182, Bernard V. Bossio v. Sam Bossio Trial Transcript page 156, line 23 through page 157, line 2.* They purchased the pizza business for $35,000. *Appendix page 151, Bernard V. Bossio v. Sam Bossio Trial Transcript page 126, lines 18-20.* Louis and Emilia Bossio would wake up at 2:00 a.m. to prepare dough, make sauce, etc.; they would do anything that was necessary to ensure the successful operation of the business. *Appendix page 182, Bernard V. Bossio v. Sam Bossio Trial Transcript page 157, lines 5-8.* Emilia eventually left the shirt factory after six months; Louis left after a year. *Appendix page 183, Bernard V. Bossio v. Sam Bossio Trial Transcript page 158, lines 9-12.* After leaving the factory they continued to pour their collective efforts into building a successful pizzeria. *Appendix page 183, Bernard V. Bossio v. Sam Bossio Trial Transcript page 158, lines 6-8.*

Keeping the business running was a family affair. The Respondent and Co-Petitioner Sam Bossio, worked in the pizza business and were essentially de facto managers in the pizza shop. *Appendix pages 41-42, Bernard V. Bossio v. Sam Bossio Trial Transcript page 16, line 23 through page 17, line 3.* They alternated managing the day to day operations at the shop. Louis and Emilia Bossio handled the prep work while their daughter, Antonia (Antoinette) Bossio, now the Estate's executrix, helped initially as the cashier. *Appendix pages 42 and 172, Bernard V. Bossio v. Sam Bossio Trial Transcript pages 16, line 21-23 and page 147, lines 20-23.*

In 1979, the pizzeria was incorporated. *Appendix pages 192-196, Plaintiff's Exhibit 1, Articles of Incorporation.* The closely held corporation was owned by Louis Bossio, Sam Bossio, and the Respondent, each having an equal interest of ten shares. *Id.* Bossio Enterprises, Inc., as it was now officially known, needed more space and more help; business was good and the corporation was expanding. *Appendix page 45, Bernard V. Bossio v. Sam Bossio Trial Transcript page 20, lines 13-15.* The Shareholders purchased a warehouse, the "commissary," which eventually became a central distribution point. *Appendix page 39, Bernard V. Bossio v. Sam Bossio Trial Transcript page 14, lines 3-23.* At the commissary, sauce and dough were made, stored, and distributed to the various new locations and franchises of Mario's Pizza. *Id.* The dough that was produced at the commissary was sold across West Virginia and Pennsylvania. *Id.*

Besides staffing the new stores, the Corporation needed additional key personnel. In July 1982, Joseph Marshalek (Marshalek) came on board full time, after serving as the Corporation's accountant for several years prior, becoming its chief

financial officer, treasurer, and accountant. *Appendix page 104, Bernard V. Bossio v. Sam Bossio Trial Transcript page 79, lines 13-24.* Marshalek dealt primarily with financial affairs related to the Corporation. *Id.* When necessary, Marshalek also dealt with minor legal matters such as reviewing leases, explaining the legal significance of certain actions, and drafting agreements. *Id.* It is "possible" that Marshalek introduced the idea of a Stock Purchase Agreement to the Shareholders. *Appendix pages 106-107, Bernard V. Bossio v. Sam Bossio Trial Transcript page 81, line 21 through page 82, line 1.*

As the business became more successful, Sam Bossio and the Respondent became weary that the business would be difficult to manage in the event that one Shareholder died and the surviving spouse received their shares. *Appendix pages 49-50, Bernard V. Bossio v. Sam Bossio Trial Transcript page 24, line17 through page 25, line 6.*

According to the Respondent, in 1981, discussion began (before Marshalek began working at Bossio Enterprises, Inc.) regarding having a stock purchase agreement created to protect the Corporation from being controlled by non-sanguine family members. *Appendix page 46, Bernard V. Bossio v. Sam Bossio Trial Transcript page 21, lines 15-16.* An unexecuted draft of a stock purchase agreement was admitted at trial (the 1982 Agreement). *Appendix pages 197-208, Plaintiff's Exhibit 2, 1982 Stock Purchase Agreement.*

The 1982 Agreement *may* have been drafted by Attorney David Straface. *Appendix page 137, Bernard V. Bossio v. Sam Bossio Trial Transcript page 112, line 3.* Although Attorney Straface has neither stated with certainty that he drafted the

agreement nor does he have any record of drafting it, he was employed by the law firm customarily retained by the Corporation at the time that the agreement (if it existed) would have been drafted. *Appendix page 108, Bernard V. Bossio v. Sam Bossio Trial Transcript page 108, lines 11-16.*

The 1982 Agreement states that upon the death of one of the Shareholders, the Corporation will purchase from the decedent's estate all the shares that he owned. *Appendix page 198, Plaintiff's Exhibit 2, 1982 Stock Purchase Agreement.* The 1982 Agreement's purpose was to prevent a Shareholder's interest from passing to the surviving spouse of a deceased Shareholder. *Appendix page 197, Plaintiff's Exhibit 2, 1982 Stock Purchase Agreement.* Section Two of the agreement prescribes the method for determining the value of the Corporation. *Appendix pages 198-199, Plaintiff's Exhibit 2, 1982 Stock Purchase Agreement.* There was also a funding mechanism (life insurance) to provide the Corporation with the necessary funds to purchase the shares. *Appendix pages 199-200, Plaintiff's Exhibit 2, 1982 Stock Purchase Agreement.* An external funding source was imperative because the 1982 Agreement required an initial down payment of twenty percent of the Corporation's value to the surviving spouse, the balance of which was to be paid in installments over five years. *Appendix page 200-201, Plaintiff's Exhibit 2, 1982 Stock Purchase Agreement.* Importantly, Section 12 of the 1982 Agreement (termination clause), provided that failure to insure the life of a Shareholder would terminate the agreement. *Appendix page 205, Plaintiff's Exhibit 2, 1982 Stock Purchase Agreement.* Presumably, the Shareholders believed that the Corporation could not absorb the cost of purchasing one third (1/3) of itself.

Insurance policies were eventually purchased, and the premiums paid by the Corporation. *Appendix pages 209-253, Plaintiff's Exhibit 3, Equitable Life Insurance Documents.* Equitable Life Insurance Corporation provided the policies whose coverage began in late 1982. *Id.* The policy identification numbers are typed on the back of the draft stock purchase agreement provided by the Respondent. *Appendix page 208, Plaintiff's Exhibit 2, 1982 Stock Purchase Agreement.*

The execution of the 1982 Agreement has not been proven. The Respondent was the only witness that had a specific recollection of signing the document. *Compare Appendix page 83, Bernard V. Bossio v. Sam Bossio Trial Transcript page 22, lines 1-16* with *Appendix pages 111, 137, 157, 176, and 183, Bernard V. Bossio v. Sam Bossio Trial Transcript page 86, lines 1-13; page 112, line 3; page 132, lines 21-24; page 151, lines 6-12; and page 158, lines 21-24.* The Respondent has produced an unsigned draft with notes made by Marshalek that he claims was identical to the final version. *Appendix page 46, Bernard V. Bossio v. Sam Bossio Trial Transcript page 21, lines 19-20.* The Respondent also claims that the final version was signed by all the Shareholders despite the lack of corroborating testimony. *Id.*

Years went by and the Corporation did quite well. Unfortunately, a tragic and horrific accident derailed the Bossio's success. *Appendix page 60, Bernard V. Bossio v. Sam Bossio Trial Transcript page 35, line 13* speaking of *Wehner v. Weinstein*, 191 W.Va. 149; 444 S.E.2d 27 (W.Va. 1994). The Corporation began operating on loans, borrowing the cash value of the life insurance policies that had previously been paid-up, just to keep the doors open. *Appendix page 60, Bernard V. Bossio v. Sam Bossio Trial Transcript page 35, lines 8-14.* The individual Shareholders eventually conveyed their

personally owned real estate (after severing their spouse's survivorship interests) to the Corporation in order to capitalize it for more loans. *Appendix pages 69-71, Bernard V. Bossio v. Sam Bossio Trial Transcript page 44, line 22 through page 46, line 3.* The litigation from that suit did not end until 1994.

Antoinette Bossio, while working at the Westover Bank, informed the Shareholders of a lucrative investment opportunity in real estate. *Appendix page 60, Bernard V. Bossio v. Sam Bossio Trial Transcript page 35, lines 12-18.* The Corporation began then to diversify, shifting from operating pizza shops to purchasing and developing real property. *Id.* Despite the changes, financial difficulties were still present.

The Shareholders realized that the premium payments for the life insurance policies were becoming one of several financial burdens that the Corporation found difficult to bear. *Appendix page 56, Bernard V. Bossio v. Sam Bossio Trial Transcript page 31, line 3.* The Shareholders began to contemplate allowing the policies to lapse. *Appendix page 62, Bernard V. Bossio v. Sam Bossio Trial Transcript page 37, lines 56.* If they had allowed the policies to lapse, the stock purchase agreement would terminate. *Appendix page 208, Plaintiff's Exhibit 2, 1982 Stock Purchase Agreement.* Mortgaged to the hilt and capitalized with personal property, the Corporation was in no position to purchase a Shareholder's interest. *Appendix page 56, Bernard V. Bossio v. Sam Bossio Trial Transcript page 31, lines 5-6.*

Around 1990, B.H.M Development Corporation, Inc. (BHM) was formed. *Appendix page 61, Bernard V. Bossio v. Sam Bossio Trial Transcript page 36, line 2.* Dedicated to real estate development, BHM was formed by the Shareholders of Bossio

Enterprises, Inc., Jesse Mancini (a cousin of the Bossio brothers), and John Hamrick. *Appendix page 60, Bernard V. Bossio v. Sam Bossio Trial Transcript page 35, lines 20-24.* BHM, because it was comprised 60% by Bossio's, necessarily shared some similarities. For example, Marshalek did the accounting for both companies. *Appendix page 61, Bernard V. Bossio v. Sam Bossio Trial Transcript page 36, lines 4-5.* Furthermore, the Respondent claims that Bossio Enterprises, Inc., and BHM both had executed buy-sell agreements. *Appendix page 77, Bernard V. Bossio v. Sam Bossio Trial Transcript page 52, line 17.* Just like the 1982 Agreement, the Respondent cannot find a fully executed copy of any BHM buy-sell agreement. *Appendix page 78, Bernard V. Bossio v. Sam Bossio Trial Transcript page 53, lines 4-6.* A copy of a document that is purportedly the stock *redemption* agreement for BHM was admitted at trial; however, it also does not have Louis Bossio's signature. *Appendix pages 264-265, Plaintiff's Exhibit 4, BHM Stock Redemption Agreement of 1990.*

The 1982 Agreement served as a template for the 1990 BHM agreement. *Appendix page 61, Bernard V. Bossio v. Sam Bossio Trial Transcript page 36, lines 21-22.* The Respondent testified that Joe Marshalek removed the 1982 Agreement from the safe where it had been stored since having been allegedly signed in 1982 and used it to begin drafting the BHM agreement. *Appendix page 62, Bernard V. Bossio v. Sam Bossio Trial Transcript page 37, lines 1-2.* Apparently once he was done drafting the BHM agreement, Marshalek delivered the 1982 Agreement to David Straface to use as an outline for the new 1990 Agreement. *Appendix page 62, Bernard V. Bossio v. Sam Bossio Trial Transcript page 37, lines 11-24.*

The Respondent also stated that the revised 1990 Agreement was signed in October of 1990. *Appendix page 63, Bernard V. Bossio v. Sam Bossio Trial Transcript page 38, line 23.* The Respondent's opinion bould be due to a specific endorsement that was supposedly typed on the stock certificates in accordance with the 1990 Agreement:

> "This certificate is transferable only upon compliance with the provisions of an agreement dated 10-01-1990, among Bossio Enterprises, Inc., Louis Bossio, Sam Bossio, and Bernard V. Bossio, a copy of which is on file in the Office of the Secretary of the Corporation."

Appendix page 65, Bernard V. Bossio v. Sam Bossio Trial Transcript page 40, lines 14-18. The Respondent testified that, after Marshalek drafted BHM's agreement in October of 1990, Marshalek delivered the 1982 Agreement to Attorney Straface for revision. The Respondent also testified that Attorney Straface "would've only had the 1982 Agreement to go by." *Appendix page 62, Bernard V. Bossio v. Sam Bossio Trial Transcript page 37, lines 23-24.*

Some evidence was produced that shows a 1990 Agreement was drafted. There are notes on second copy of the draft 1982 Agreement submitted by the Respondent that Attorney Straface believes indicate that he may have drafted a revision. *Appendix pages 272-283, Petitioner's Exhibit 6, Unsigned Copy of Bossio Enterprises, Inc. 1982 Stock Purchase Agreement.* Mr. Straface, drawing conclusions based on those notes only, thought that there was a possibility that he had done so. *Appendix page 137, Bernard V. Bossio v. Sam Bossio Trial Transcript page 112, lines 6-18.* He also remembered meeting with the Respondent, Sam and Marshalek on a weekly basis. *Appendix page 134, Bernard V. Bossio v. Sam Bossio Trial Transcript page 109, lines 20-22.* This was likely due to his involvement with the Respondent personally, the

Respondent's divorce, and his representation of Bossio Enterprises, Inc. *Appendix page 133-134, Bernard V. Bossio v. Sam Bossio Trial Transcript page 108, line 7 through page 109, line 6.* Notably, however, Attorney Straface's records included a discovery request sent by Bill Frame, Laura Bossio's divorce attorney, who was attempting to ascertain the value of the marital estate. *Appendix page 140, Bernard V. Bossio v. Sam Bossio Trial Transcript page 115, lines 13-16.* Though still possessing the discovery request that required its production, Mr. Straface could not provide a copy of the 1990 Agreement. *Appendix page 141-143, Bernard V. Bossio v. Sam Bossio Trial Transcript page 116, line 21 through page 118, line 2.*

The Respondent bases the alleged existence of the 1990 Agreement on similarities between the BHM Agreement and the 1982 Agreement. The Petitioner concedes that there are similarities between the BHM and 1982 Agreements. For example, each agreement contains a section labelled "Termination." *Compare Appendix page 205, Petitioner's Exhibit 2, 1982 Stock Purchase Agreement* with *Appendix page 263, Petitioner's Exhibit 4, BHM Stock Redemption Agreement of 1990.* The BHM agreement, however, has removed the requirement to maintain insurance on the Shareholders, thus making it substantively different.

The Respondent, as the only witness that could remember anything specific in regards to the 1990 Agreement, stated that the "only thing that changed was that the – that you could have insurance but it wasn't necessary to have insurance to help fund it." *Appendix page 63, Bernard V. Bossio v. Sam Bossio Trial Transcript page 38, lines 8-10.* The circumstances facing the Corporation would have supported his assertion. The Corporation was facing legal battles and diversifying its operations. *Appendix page 60,*

Bernard V. Bossio v. Sam Bossio Trial Transcript page 35, lines 8-18. The Corporation's restrictive budget made it difficult to meet the revolving premium payments on the whole life policies. *Appendix page 63, Bernard V. Bossio v. Sam Bossio Trial Transcript page 38, lines 4-5.* Moreover, there was little capital with which to purchase a deceased Shareholder's interest. *Appendix page 70, Bernard V. Bossio v. Sam Bossio Trial Transcript page 45, lines 5-10.* Rather than being identical to the BHM Agreement, it is more likely that if a 1990 Agreement existed for the Corporation, it simply made insurance optional instead of mandatory. *Appendix pages 75-76, Bernard V. Bossio v. Sam Bossio Trial Transcript page 50, line 23 through page 51, line 2.*

If the change had occurred consistent with the Respondent's testimony, the 1990 Agreement would still have the termination clause. Therefore, if the insurance did lapse, the buy-sell agreement would terminate. *Appendix page 205, Plaintiff's Exhibit 2, 1982 Stock Purchase Agreement.* Accordingly, if the Corporation could not have afforded to pay the premiums of a life insurance policy, it could ill afford the expense of acquiring a Shareholder's interest.

The Respondent testified that the 1990 Agreement was signed and placed in a folder labelled "buy/sell" by Marshalek where it remained for years. *Appendix page 64, Bernard V. Bossio v. Sam Bossio Trial Transcript page 39, lines 13.* The Respondent also alleged that the folder, while it still exists, is empty and all of its contents—indeed both executed versions of the stock purchase agreements are missing. *Appendix page 68, Bernard V. Bossio v. Sam Bossio Trial Transcript page 43, lines 17-20.* He has testified that even the minutes and corporate books have disappeared. *Id.*

On September 11, 2007 Louis Bossio died testate. *Appendix page 339, Defendant's Exhibit 3, Application of Fiduciaries.* His will devised most of his property to the Louis Bossio Trust, a testamentary trust, for the benefit of his wife Emilia. *Appendix pages 320-332, Defendant's Exhibit 1, Last Will and Testament of Louis (Luigi) Bossio.* Louis Bossio 's stock has not been redeemed by the Corporation, which has given rise to the instant case. *Appendix pages 7-12, Plaintiff's Second Amended Complaint.*

In the 1990's, life insurance did in fact lapse due to non-payment of the premiums. *Appendix page 252, Plaintiff's Exhibit 3, Equitable Life Insurance Documents.* The Petitioner asserts that if a Stock Purchase Agreement did exist and the parties were bound to it, then the termination clause would have been triggered by the lapse in insurance coverage. The ten shares belonging to Louis Bossio, thus, would pass to his testamentary trust just as Antoinette Bossio and Emilia Bossio believed that they would have. *Appendix pages 175 and 184, Bernard V. Bossio v. Sam Bossio Trial Transcript page 150, lines 5-6; and page 159, line 10-14.*

On September 5, 2014, the Monongalia County Circuit Court entered its Trial/Judgment Order which contained the following findings:

> 3. The Court finds that the Plaintiff has proven that the parties intended to enter into an arrangement where upon the death of one of the shareholders of Bossio Enterprises, Inc., the Corporation would purchase the stock of the deceased shareholder.
> 4. The Court finds that the 1982 Stock Purchase Agreement was executed and remained in effect until the life insurance policies lapsed from failure to pay the premiums.
> 5. The Court further finds that the Stock Purchase Agreement was revised in 1990. The terms of the 1990 Agreement were identical to the 1982 Agreement with the exception of the requirement that the Corporation purchase policies of life insurance on the life of each shareholder.

Appendix page 480, Trial/Judgment Opinion Order.

The Estate of Luigi Bossio a.k.a Louis Bossio filed with the Circuit Court a Motion for Clarification asking the court in Paragraph 7 to state whether:

> a. The 1982 and 1990 Stock Purchase Agreements existed simultaneously until the insurance policies were terminated sometime in the late 1990s;
> b. The Court specifically finds that the 1990 Stock Purchase Agreement was executed by the parties, or whether the 1982 Stock Purchase Agreement was modified by an oral agreement of the parties; and
> c. Section Twelve of the 1982 Stock Purchase Agreement remained in full force and effect in the 1990 Agreement. If so, whether the 1990 Agreement terminated with the termination of the insurance policies sometime in the late 1990s.

Appendix page 496, Defendant The Estate of Louis Bossio a.k.a. Louis Bossio's Motion for Clarification of Trial/Judgment Opinion Order.

In its Amended Order entered December 1, 2014, the Circuit Court stated that the

> 1990 Agreement removed the requirement of life insurance and, therefore, would have removed any consequences of not having life insurance. In fact, it is the Court's opinion that the purpose of the 1990 Agreement was to make the life insurance modification of the 1982 Agreement, and to basically keep the 1982 Agreement in place otherwise.

Appendix pages 531-532, Amended Order. The present dispute will require this Court to determine whether the trial court erred in drawing those conclusions and issuing its Order.

The essence of this case is based in contract. Was there a contract and were the parties bound to it? Did the Circuit Court appropriately draw the boundaries of the contract? The purpose of the agreement was to keep the family business within the family. The intent of the parties was to preclude the possibility that their business could be controlled by a spouse.

V. SUMMARY OF THE ARGUMENT

The Circuit Court's conclusions of law finding that the 1982 Agreement existed, was executed, and later modified in 1990 should be overturned because the Respondent failed to prove the existence, execution, and contents by clear and convincing evidence.

The Circuit Court's conclusion that there was a modification in 1990 that removed the termination clause should be overturned because it misconstrued the subsequent Agreement, if one did exist. The Circuit Court should have considered whether the 1982 Agreement was entire which would have resulted in it applying both provisions or finding that no contract existed at all. The Circuit Court also should have considered whether the insurance requirement was a condition precedent to any agreement to purchase a Shareholder's interest. Alternatively, the Circuit Court should have considered whether the 1982 Agreement was severable which would have allowed it to modify the insurance requirement to be optional but would have left the termination clause in place.

The Circuit Court's order removing the termination clause should be vacated because it abused its discretion by not adequately considering important factors deserving significant weight. The Circuit Court failed to consider the obvious financial impossibility that its construction would have created for the Corporation.

The Record will allow the this Court to overturn the Circuit Court's conclusion of law because the Respondent failed to meet his evidentiary burden, that the lower court misconstrued the 1990 Agreement, and that the Circuit Court failed to consider all the important factors.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner respectfully requests oral argument before the West Virginia Supreme Court of Appeals pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. The Petitioner also requests a full opinion from this Court.

VII. ARGUMENT

An agreement that never existed could not be lost. One cannot prove that parties to a contract reached mutual assent, if he cannot prove the contents of the contract. An agreement that never existed could not later be modified. One cannot prove the contents of the modification if he could not prove what existed previously. These assertions are logical and legally sound. The Petitioner will prove that Circuit Court's numerous errors lacked appropriate consideration which led to misapplication of the law.

The Circuit Court's conclusion that the Respondent met his burden of proof should be overturned because he failed to prove the existence, execution, and contents of an allegedly "lost" agreement by clear and convincing evidence. The Circuit Court's conclusions of law in this respect should be reviewed *de novo.* The Respondent ultimately failed to overcome the evidentiary burden of proof at trial.

The Circuit Court's conclusion that the 1990 Agreement removed the termination requirement from 1982 Agreement should be overturned because the Circuit Court misapplied contract interpretation law in determining the contents of the missing agreement. The Circuit Court's conclusions of law in this respect should also be reviewed *de novo.* The Circuit Court's conclusion of law removing termination as a consequence of not maintaining life insurance on the Shareholders should be overturned because the 1982 Agreement was an entire contract thus making the termination clause inseverable from the insurance requirement. Alternatively, the Circuit Court's conclusion of law removing termination as a consequence of not maintaining life insurance on the Shareholders should be overturned because the 1982 Agreement was

a severable contract thus not requiring the removal of the termination clause even if the insurance became optional.

The Circuit Court abused its discretion in holding that the 1982 Agreement or the 1990 Agreement, or both, did not terminate upon the cancellation of life insurance policies in the 1990s due to a nonpayment of premiums because that conclusion violates the Shareholders' intent in contracting the Agreement. This Court should review the Circuit Court's Order that the removal of the insurance mandate from the 1990 Agreement also required removal of the termination clause from the 1982 Agreement under an abuse of discretion standard. The Circuit Court's Order removing the termination clause from the 1990 Agreement should be overturned because it violated the Shareholder's contractual intent.

A. The Circuit Court's conclusion that the Respondent met his burden of proof should be overturned because he failed to prove the existence, execution, and contents of an allegedly "lost" agreement by clear and convincing evidence.

Trial testimony shows that the recollection of every witness, except for the Respondent, was that it was *possible* that a 1982 or 1990 Agreement was drafted. *See generally Appendix pages 26-191, Bernard V. Bossio v. Sam Bossio Trial Transcript.* However, the Circuit Court, should not be allowed to make the inferential leap from possibility (of existence) to certainty (of the execution and contents) based solely on the Respondent's testimony. *Appendix pages 474-480, Trial/Judgment Opinion Order.* This is especially true because the Circuit Court also found that the Petitioners—two out of the three Shareholders—denied the existence of the agreements and that they denied that the Estate was bound by the agreement if it did exist. *Id.* There was simply not enough evidence produced by the Respondent to meet his evidentiary burden.

1. The Circuit Court's Conclusions of Law should be reviewed *de novo*.

On September 5, 2014, and on December 1, 2014, the Monongalia County Circuit Court entered is Trial/Judgment Opinion Order and its Amended Order, respectively, each of which contained conclusions of law. *Appendix pages 480 and 531-532, Trial/Judgment Opinion Order and Amended Order.* The Petitioner disputes the conclusions published by the Circuit Court. This Court should examine those conclusions of law under the *de novo* standard of review.

"This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*." *Burgess v. Porterfield*, 196 W. Va. 178, 180; 469 S.E.2d 114, 116 (1996).

The Respondent was not able to prove the existence, execution, and contents of either stock purchase agreement by clear and convincing evidence, therefore this Court should overturn the Circuit Court's conclusions of law. Thus, since this argument requires a review of the court's conclusions of law and because it presents a question of law, this Court should apply the *de novo* standard of review when analyzing the Circuit Court's findings.

2. The Proponent of a lost document must prove the existence, execution, and contents equivalent to the civil standard of "clear and convincing" evidence.

Although a proponent may use secondary evidence to prove the contents and execution of a document that has been shown to be lost, the Respondent has failed to prove the document's existence, execution, and contents with secondary evidence. The burden of proof on a proponent of a lost document has been stated to require the

existence, execution, and contents to be "clearly proven" by "evidence of the clearest and most satisfactory character." *See Lynn v. Collins*, 77 W. Va. 592, 596; 87 S.E. 934 (W.Va. 1916), *Drake v. Parker*, 122 W. Va. 145; 7 S.E.2d 651 (W.Va. 1940), and *Gill v. Colton*, 12 F.2 531 (4th Cir. 1926). This evidentiary standard must be equivalent to the clear and convincing standard. The Respondent failed to meet that evidentiary standard at trial, therefore the Circuit Court should not have concluded as a matter of law that the existence, execution, and contents of either agreement had been proven or that the Estate of Louis Bossio is bound thereto.

West Virginia Rule of Evidence 1004(1) states in pertinent part, "[a]n original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if...[a]ll the originals are lost or destroyed, and not by the proponent acting in bad faith."

Rule 1004 means that the Respondent could have used secondary evidence at trial to prove the contents of the 1982 and 1990 Agreements. However, there are problems with the way that the Circuit Court applied Rule 1004 to the evidence, or lack thereof, in this case.

First, there are implied evidentiary tasks that must be completed. As paragraph (1) of Rule 1004 states, the originals must be either lost or destroyed. A writing, recording, or photograph must first exist in order to subsequently be lost or destroyed. That principle implicates the mechanics of the presentation required of the proponent of a lost document. *E.g. Marshall v. Elmo Greer & Sons*, 193 W. Va. 427; 456 S.E.2d 554 (W.Va. 1995).

In *Marshall*, a subcontractor brought an action against the prime contractor alleging breach of contract. *Id.* at 429, 193 S.E.2d at 556. The subcontractor sought damages for work he performed that exceeded the scope of the contract. *Id.* at 429, 193 S.E.2d at 556. The subcontractor insisted that the contract, which awarded him almost $237,000 to clear and grub 91 acres, was based on an agreement that would have paid him $1,500 per acre for every acre that he actually cleared. *Id.* at 429, 193 S.E.2d at 556. The contractor allowed him to clear 110 additional acres then refused to pay for the extra work. To support his claim for $1,500 per acre, the subcontractor alleged that a cover sheet to the contract substantiated the aforementioned agreement. *Id.* at 429, 193 S.E.2d at 556.

This Court concluded that the subcontractor's claim was not creditable. The Court analyzed the contract produced by the contractor noting that it began with the words, "CONSTRUCTION AGREEMENT," proceeded to then describe the parties and the date, outlined consecutive sections numbered 1 through 10, and ended with a signature page. *Id.* at 429, 193 S.E.2d at 556. Further, the contract contained a merger clause. *Id.* at 429, 193 S.E.2d at 556. Since the contract appeared complete on its face, and the subcontractor failed to submit any other proof of the cover page's existence, the Court rejected the allegation regarding the $1,500 per acre agreement. Since the subcontractor could not prove that the agreement existed, the Court was forced to reject the argument that it had been lost. *Id.* at 430, 193 S.E.2d at 557.

In contrast, the *Marshall* Court cited *Smith v. Lurty*, 108 Va. 799; 62 S.E. 789 (Va. 1908) to support its assertion that a "high degree of proof from one seeking to establish a lost instrument is required." *Marshall* at 429; 193 S.E.2d at 556. *Smith* dealt

with the issue of whether a parcel of land was conveyed to the appellee or if it passed to a legatee through a decedent's will. The Court's decision turned on whether the appellee provided the trial court with sufficient evidence to establish a lost deed that would then support her contention that the parcel was conveyed to her. Ultimately, the Court affirmed the lower court in favor of the appellee, holding in regards to whether the deed had been proven to be lost:

> Generally, the loss of an instrument can only be established by circumstantial evidence. ***Where the existence and contents of an alleged lost paper have been clearly proved***, and there is nothing in the facts and circumstances of the case to suggest that the party seeking to have it set up could have any motive or object in alleging its loss, ***the same high degree of proof as to its loss ought not to be required as where this is not the case***. The degree of proof of the loss depends upon the circumstances of the particular case, and the rule should be so applied as to promote the ends of justice and carefully guard against fraud and imposition. The rule only requires that its loss shall be established with reasonable certainty in a case like this.

Smith 804-805; 62 S.E. 791-792, emphasis added.

From these cases we can discern what a proponent for a lost document must prove:

1. The document once existed,
2. The document was subsequently lost or destroyed,
3. The document was executed, and
4. That the document contained some pertinent information.

The case law demands that these elements be proven; logic demands that they be proven in this order.

Second, the Circuit Court's conclusions do not reflect application of the correct standard of proof. The existence, execution, and contents of the lost document must be proven by clear and convincing evidence as opposed to the loss of the document which, as we learned above, must only be proven by a preponderance of the evidence. Once the loss of the original is proven, extrinsic and parol evidence are allowed to prove the document's execution and contents. The contents of a document need not be proven

verbatim, but the substantial terms of the documents must be shown by a level of evidence likely equivalent to the "clear and convincing" evidentiary standard. *E.g. Dart v. Commercial Union Ins. Co.* 28 Cal.4th 1059, 53 P.3d 79 (citing *Seaboard National Bank v. Ackerman* 16 Cal.App. 55, 115 P. 91 (1911)) (Holding that in the "case of lost instruments where no copy has been preserved, it is not to be expected that witnesses can recite its contents word for word.").

This Court has written opinions whose description of the evidentiary obligation closely emulate that of the "clear and convincing" standard. Notably, the Court has used as support the case of *Smith v. Lurty*, 108 Va. 799; 62 S.E. 789 (Va. 1908). That case identified two standards of proof by which a proponent must prove the loss of a lost document: one standard whose language parallels that of the "clear and convincing" standard for proponents who may have acted in bad faith and another standard for everyone else which closely matches the language associated with the "preponderance of the evidence" standard. *Id.* 804-805; 62 S.E. at 791-792. The reason this is notable is because the language used to describe the burden of proof necessary to establish existence, execution, and content is nearly identical to that of the standard for the fraudulent proponent. *Id.*; 62 S.E. at 791-792. This Court has made similar statements regarding the proponent's burden of persuasion.

For example, in *Lynn v. Collins*, a case cited by the Respondent, the Court stated, "the important matters to be established, in order to maintain a suit on a lost instrument, are its due execution and contents." *Lynn v. Collins*, 77 W.Va. 592, 596; 87 S.E. 934, 936 (W.Va. 1916) (Existence was not in issue in this case.). The Court

accepted that those matters were "clearly proven" because a deed of trust executed by both makers also contained a recital as to the terms of the note. *Id.*; 87 S.E. at 936.

Also, in *Miller v. Estabrook*, 273 F. 143 (4th Cir. 1921), the Federal District Court applied West Virginia law to a case regarding a lost deed. A fire in 1909 destroyed the county courthouse, including the deed in dispute. *Id.* at 147. Because the attorney for the appellant had made an abstract during the conveyance to the appellant, showing the title derivation through the disputed periods, the court held that it "met the requirement that evidence as to the existence of lost documents must be clear and convincing." *Id.*

In *Ohio River Railroad v. Sehon*, 33 W. Va. 559; 11 S.E. 18 (W.Va. 1890), the Supreme Court of Appeals dealt with a written contract whereby an agent for the railroad purchased property and rights of way to construct a rail line. In *Sehon*, the defendant landowner brought an action for ejectment after the railroad was constructed and operating claiming that the contract he made with the railroad's agent did not convey to the railroad the land it actually used. *Id.* at 562, 11 S.E. at 19. At trial, the landowner persuaded the jury that the contract exhibited by the railroad was different than the one he had signed. *Id.* at 561, 11 S.E. at 19. On appeal, the Court noted that the differences proved by the landowner were inconsequential as to the terms of the contract. *Id.* at 564, 11 S.E. at 20. For instance, the landowner wanted a construction of the contract that correlated to a "survey" that he had conducted. Id. at 563-564, 11 S.E. at 19. Apparently, his survey included a handmade scrawling on a fencepost indicating the boundary line. Id. at 563-564, 11 S.E. at 19. The Court held that the proof made by the railroad demonstrated "conclusively" that the defendant landowner

was "mistaken." Id. at 564, 11 S.E. at 20. This case is an illustration of two principles: first, that the contents of a contract must be proven, and second, that the proof must be "conclusive."

"It is incumbent upon one seeking to establish a lost instrument to prove it by evidence of the clearest and most satisfactory character." *Gill v. Colton*, 12 F.2d 531 (4th Cir. 1926). The court in *Gill* was considering yet another West Virginia land dispute where the deed was lost. Though acceptance of a deed is usually presumed where the delivery would benefit the grantee, where the appellant established that he had no intention of receiving the deed, the appellee was unable to prove by the requisite standard that delivery was effected, thus resulting in damages because the mineral rights had not been severed from the land. *Id.* at 534. The holding exemplifies the mandate that a proponent of a lost document prove both existence and execution by a very high level of evidence.

The Respondent's evidence at trial failed to meet that very high level demanded by this Court. Admitted at trial was an unsigned draft of a stock purchase agreement dated 1981. *Appendix page 197, Plaintiff's Exhibit 2, 1982 Stock Purchase Agreement.* Additionally, a stock redemption agreement from a foreign company was admitted. *Appendix page 254, Plaintiff's Exhibit 4, BHM Stock Redemption Agreement of 1990.* A second copy of the 1981 draft agreement with Mr. Staface's notes was admitted. *Appendix page 272, Plaintiff's Exhibit 6, Unsigned Copy of 1982 Stock Purchase Agreement.* Essentially, all that the Respondent proved at trial was that a draft stock purchase agreement existed in 1981. The Respondent never showed that he could produce an executed version of the 1982 Agreement.

Regarding the 1990 Agreement, the Respondent has shown that there were some stock certificates that carried an endorsement referencing the agreement. *Appendix pages 266-271, Bossio Enterprises, Inc. Stock Certificates.* The endorsement, however, carries a date that is inconsistent with the Respondent's testimony because the certificates could not have been endorsed pursuant to an agreement that did not exist on October 1, 1990. We know that it did not exist because Marshalek had to draft the BHM Agreement (dated blank October 1990) before he could deliver the 1982 Agreement that he used as a template to Mr. Straface who then drafted the 1990 Agreement. *Appendix pages 61-62, Bernard V. Bossio v. Sam Bossio, Trial Transcript page 36 line 17 through page 37 line 24.* Further, there was no evidence, other than the Respondent's testimony, that corroborates the endorsed certificates co-existing with the executed 1990 Agreement.

Besides the coincidental existence of incomplete, unrelated, and unsigned documents, the Respondent has not proven that either the 1982 or the 1990 Agreement existed. He has simply shown coincidence; he has not shown that the agreements existed in their final, executed form. Without an existence, there could not have been an execution. The Respondent has never shown that the parties to an agreement have had a meeting of the minds, thereby also failing to prove that any party other than himself ever assented to be bound by the agreement. Moreover, the Respondent has only shown, in regards to the contents, that an unsigned agreement existed in 1981 and that some other allegedly signed 1990 Agreement, a signed copy of which he has also failed to locate, is similar to the stock redemption agreement owned by some other corporation. *Appendix pages 197 and 254, Plaintiff's Exhibit 2 and 4, 1982 Stock*

Purchase Agreement and BHM Stock Redemption Agreement of 1990. Convincingly, the BHM stock redemption agreement that the Respondent relies upon to support his assertion that there was a similar agreement binding the Shareholders of the Corporation was not signed by Louis Bossio. *Appendix page 263, Plaintiff's Exhibit 4, BHM Stock Redemption Agreement.*

What is notable throughout the cases is that the documents used to prove the existence of the lost document is usually analogous to the one lost. For example, a blank standard form has been used to prove the contents of the same missing (executed) form. *See Roberson v. Ocwen Federal Bank*, 250 Ga.App. 350, 553 S.E.2d 162 (Ga. 2001). A deed of trust containing identical terms has been used to prove the existence of a promissory note. *See Lynn v. Collins*, 77 W. Va. 592, 87 S.E. 934 (W.Va. 1916). An abstract of a title has been allowed to show the chain of title where the deed was destroyed by a fire in the courthouse. *See Miller v. Estabrook*, 273 F. 143 (U.S. Dist. of W.Va. 1921). Copies of an original have been used to prove the contents of the original. *See Ohio River Railroad v. Sehon* 33 W. Va 559, 11 S.E. 18 (W.Va. 1890). Nowhere in the case law has an agreement from a foreign corporation, among foreign shareholders, in a business with a completely different mission and financial structure been allowed to be presented to prove the contents of an agreement entered into by the Shareholders of the instant corporation.

The Respondent has not offered an analogous document to prove the one in question. He has not shown a blank, standard form stock purchase agreement from Bossio Enterprises, Inc. to prove the contents of the 1990 Agreement as did the appellant in *Roberson v. Ocwen Federal Bank* 250 Ga.App. 350, 553 S.E.2d 162 (Ga.

2001). He has not offered a document, executed by the Shareholders and subsequently recorded like the litigants in *Lynn v. Collins* 77 W. Va. 592, 87 S.E. 934 (W.Va. 1916). The Respondent has not shown the effect desired to be caused by a stock purchase agreement consistent with the attorney's title abstract in *Miller v. Estabrook* 273 F. 143 (U.S. Dist. of W.Va. 1921). He has not provided a copy of the executed agreements as in *Ohio River Railroad v. Sehon* 33 W. Va 559, 11 S.E. 18 (W.Va. 1890).

Testimony alone offered by the proponent has never been sufficient as clear and convincing evidence absent strong corroboration. The types of documents lost which were subsequently proved were somewhat simple in operation: the aggrieved party only sought to show its entitlement—not that there was a contract and that the contract was later revised and that because of the revision a section (that was disadvantageous to the proponent) disappeared.

The Respondent's evidence at trial consists of his own testimony, a copy of a stock purchase agreement from another corporation, and testimony from Attorney Straface, Marshalek, and Sam Bossio that indicate the *possibility* that the document *may* have been created, *may* have been executed, and *may* have had some contents similar to the BHM agreement. Since possibility is not plausibility, and plausibility is still shy of "evidence of the clearest and most satisfactory character," the Respondent has failed to meet his evidentiary burden. *Gill v. Colton*, 12 F.2d 531. Accordingly, upon a *de novo* review, this Court should overturn the Circuit Court's conclusions of law that establish and give effect to the stock purchase agreements in dispute.

B. Circuit Court's conclusion that a 1990 Stock Purchase Agreement removed the termination requirement from 1982 contract should be overturned because the Circuit Court misapplied contract interpretation law in determining the contents of the missing agreement.

The Petitioner asserts that the Respondent failed to meet his evidentiary burden at trial to prove that the either agreement ever existed. If, however, this Court believes the Respondent has met his burden, the following argument is presented in the alternative.

The jurisprudence that guides courts in their efforts to construe ambiguous contract is well settled in West Virginia. In cases where lost documents are concerned, the contents of the lost document can create an issue of construction that is akin to ambiguous contracts because the terms aren't available for inspection. Thus, contract construction jurisprudence should apply to situations involving lost documents.

The Circuit Court was required to apply construction fundamentals to the 1982 Agreement, and, if it was later modified, also apply those fundamentals to the 1990 Agreement. The Circuit Court should have considered whether the stock purchase agreement was entire or severable. The Circuit Court should have considered the Shareholders' intent in entering the agreement. Since the Circuit Court failed to apply the fundamental laws of contract construction to the facts shown at trial, its conclusions of law must be overturned.

1. The Circuit Court's Conclusions of Law should be reviewed *de novo*.

The Circuit Court entered its Trial/Judgment Opinion Order and its Amended Order, each of which contained conclusions of law. The Petitioner disputes the

appropriateness of those conclusions published by the Circuit Court. This Court should examine those conclusions of law under the *de novo* standard of review.

"This Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*." *Burgess v. Porterfield*, 196 W. Va. 178, 180; 469 S.E.2d 114, 116 (1996).

In its Trial/Judgment Opinion Order, entered September 5, 2014, the Circuit Court found that the Respondent proved that the parties intended to enter into the stock purchase agreement in 1982, that the 1982 Agreement was executed and remained in effect until the life insurance policies lapsed, that the 1982 Agreement was modified in 1990, but that the mandate for the Corporation to carry insurance was removed. *Appendix page 490, Trial/Judgment Opinion Order.* In its Amended Order, the Circuit Court found that the removal of the insurance mandate necessitated the removal of the termination clause. *Appendix Page 531-532, Amended Order.*

If the Circuit Court believed that the Respondent had made the appropriate evidentiary showing that the 1982 and 1990 Agreements existed and were executed, he still offered no viable proof that the removal of the insurance mandate necessitated the removal of the termination clause. The modification of the section requiring life insurance did not, in fact, require removal of the termination clause. The modification simply allowed life insurance on the Shareholders to be optional as opposed to mandatory. The 1990 Agreement should have retained the termination clause because the parties intended to provide financial protection and assurance for the Corporation,

therefore the Circuit Court's conclusions of law are incorrect. This Court should apply the *de novo* standard of review when analyzing the Circuit Court's findings.

2. The Circuit Court's conclusion of law removing termination as a consequence of not maintaining life insurance on the Shareholders should be overturned because the 1982 Agreement was an entire contract thus making the termination clause inseverable from the insurance requirement.

The Circuit Court erred by severing the termination clause from the 1990 Agreement because the 1982 Agreement was an entire contract. The two clauses, the insurance mandate and the termination provision, were of equal importance to the contract and the agreement as a whole was dependent upon the applicability of both articles.

Both Section 3 (insurance requirement) and Section 12 (termination clause) of the 1982 Agreement are of the same importance to the agreement. *See Appendix pages 197-208, Plaintiff's Exhibit 2, 1982 Stock Purchase Agreement.* The insurance requirement provides the parties a means of accomplishing the intent of the agreement. Section 12(4) provides instruction to the parties in the absence of the necessary means to accomplish the intent of the agreement. The termination clause demonstrates that the intent of the parties would have been to abolish the agreement in the event that insurance was not carried on the lives of the Shareholders because they knew that funding the twenty percent (20%) down payment to purchase a Shareholder's interest would have been financially devastating to the Corporation. Since the two sections carried the same degree of importance internal to the agreement, the agreement in respect to the two clauses is entire and not severable. A contract is entire when all the parts, sections, and/or clauses are to be performed as a whole. "Thus, the best test is

said to be whether all of the things, as a whole, are of the essence of the contract: that is, if it appears that the purpose is to take the whole or none, the contract is entire; otherwise it is severable." 17A Am Jur 2d Contracts § 416, not. 57. "Another test supported by a number of authorities is that a contract is entire when, by its terms, nature, and purpose, it contemplates that each and all of its parts are interdependent and common to one another and to the consideration, and is severable, when, in its nature and purpose, it is susceptible of division and appointment, and has two or more parts in respect to matters or things contemplated and embraced by the contract which are not necessarily dependent upon each other." 17A Am Jur 2d Contracts § 417, not. 59.

The concept of entire contracts is not foreign to West Virginia. In *Norman Lumber Co. v. Keystone Mfg. Co.*, 100 W. Va. 515; 131 S.E. 12 (W.Va. 1925) this Court said:

> A contract is entire, and not severable, when by its terms, nature and purposes it contemplates and intends that each and all of its parts, material provisions and the consideration, are common each to the other and interdependent.

Id. at 524; 131 S.E. at 15. The Court went on to say, "If it appears that the purpose was to take the whole or none then the contract would be entire." *Id.* at 524; 131 S.E. at 15.

Under an entire contract, either the whole of the contract is valid or not. Applied to the agreement at bar, the stock purchase agreement is entire if the insurance requirement is interdependent on the termination clause. The Petitioner asserts that it is and that the Circuit Court incorrectly found otherwise.

Considering the framework provided the Court, the interdependence of the insurance requirement and the termination clause make this an entire contract. Furthermore, since the termination clause made the existence of the agreement

contingent on the purchase and maintenance of insurance policies, the agreement forced the Shareholders to accept all or none of the contract's terms. The Corporation would not have been able to afford $190,200 for the twenty percent (20%) down payment, plus a monthly installment over the next five years, if it could not afford $599 per month for the insurance premium. Having anyone, much less non-family members, assume control of an insolvent corporation would have definitely violated the Shareholders intent when they entered the agreement. Therefore, either the whole of the stock purchase agreements are valid (including the termination clause in the 1982 Agreement) or they are not (which would terminate the agreement).

The 1982 Agreement was an entire contract even if the insurance requirement was modified from the 1990 Agreement. The modification of the insurance requirement did not demand the removal of the termination clause because the purpose of the contract was dependent on the interrelatedness of the two provisions. Another way to consider the operation of these provisions is to think of the insurance as a condition precedent to the buy-sell agreement. Without insurance, there could have been no covenant. Since both agreements are entire, and the Shareholders must accept or reject each agreement as a whole, the Circuit Court erred in concluding that the consequence for not maintaining life insurance on the Shareholders was removed.

3. The Circuit Court's conclusion of law removing termination as a consequence of not maintaining life insurance on the Shareholders should be overturned because the 1982 Agreement was a severable contract thus not requiring the removal of the termination clause even if the insurance became optional.

Alternatively, the 1982 Agreement was severable meaning that if the Circuit Court appropriately modified the insurance requirement to be optional, that change in

and of itself did not force the court to eliminate the termination clause. If the Circuit Court was not required to eliminate the termination clause, the court erred by deleting it because its removal violated the intent of the Shareholders.

This Court has also embraced the concept of severable contracts. *See Regent Waist Co. v. O.J. Morrison Dep't Store Co.*, 88 W. Va. 303; 106 S.E. 712 (W.Va. 1921). In *Regent Waist*, this Court dealt with the inquiry of whether a contract under which goods were purchased was severable. The buyer of ladies' garments contracted to purchase, in several shipments, garments of different sizes and colors each having a different price. *Id.* at 304; 106 S.E. at 713. When the buyer accepted some garments, but rejected others, this Court affirmed the verdict favoring the buyer reasoning:

> If, however, the part of a contract to be performed by one party consists of several and distinct items, and the consideration to be paid by the other party is apportioned to each item to be performed, or is left to be implied under the law, the contract is generally held to be severable or divisible; and the failure of the promisor to perform one item does not entitle the other party to rescind the contract, and refuse to accept further performance, nor discharge him from the obligation of paying for the other items."

Id. at 309; 106 S.E. at 715.

A consistent result in the instant case would allow the insurance mandate to become optional without necessarily removing the termination clause. Since the two provisions could have operated independently of each other, the Circuit Court's removal of the termination clause was unnecessary. Moreover, an unnecessary construction that prejudices two of the three parties to the contract is an abuse of the court's discretion.

C. The Circuit Court abused its discretion in holding that the 1982 Stock Purchase Agreement or the 1990 Stock Purchase Agreement, or both, did not terminate upon the cancellation of life insurance policies in the 1990s due to a nonpayment of premiums because a conclusion that gives effect to that interpretation would violate the Shareholders' intent in contracting.

1. The West Virginia Supreme Court of Appeals will review the Circuit Court's Order that the modification of the insurance mandate from the 1990 stock purchase agreement ineludibly removed the termination clause from the agreement under an abuse of discretion standard.

The Circuit Court abused its discretion in concluding that the termination clause was required to be removed from the 1990 Agreement upon the insurance provision becoming optional because it did not adequately consider all the available evidence.

This Court has written "in general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them." *Gentry v. Mangum,* 195 W. Va. 512, 520; 466 S.E.2d 171 (W.Va. 1995).

The Circuit Court ignored several important factors. First, the Circuit Court should have considered the reality it created for the Corporation by removing the termination clause. If the Corporation was indeed experiencing cash flow troubles, trouble so severe that the insurance policies were burdensome and the purchase agreement needed to be amended to accommodate for the lack of cash, the Corporation could have afforded neither the twenty percent (20%) down payment required to purchase the shares nor the continuing note for five years afterwards.

Second, the Circuit Court should have considered the financial circumstances facing the Corporation at the time that the alleged revision occurred. There would have

been no action by the Corporation to purchase the shares during the 1990's because the shortage of capital would have endangered the solvency of the Corporation.

Next, the Circuit Court should have considered the intent of the Shareholders. Their intent was to keep the Respondent's and Sam Bossio's wife out of the Corporation's affairs. Even if the Corporation could have afforded the purchase, it was not likely the brothers would have made the purchase upon the death of their father because the purpose of the agreement was to keep their wives out of the Corporate governance. Since Emilia Bossio, their mother, was present during the operation of the Corporation and contributed substantially in its founding, operations, and start-up funding, it is unlikely that they would have objected to their mother's participation in the corporate governance.

The last important factor that was ignored by the Circuit Court was also monetary in nature. Insurance coverage of $100,000 was a significant guarantee to the Shareholder and his surviving spouse that the Corporation would be financially capable of purchasing the shares. For example, during the Respondent's divorce, his ten shares were valued at $750,000. *Appendix page 479, Trial/Judgment Opinion Order.* In the event that he died, the Corporation would have needed only $50,000 to purchase the shares. (20% of the value=$150,000 minus the life insurance=$50,000). The life insurance also provided significant assurance to the remaining Shareholders that their stake in the Corporation was not jeopardized by undercapitalization if it must purchase the shares. Essentially, the anticipated consideration for the exchange of promises upon which the agreement was built would have been illusory. See *Appendix 197-198, Plaintiff's Exhibit 2, 1982 Stock Purchase Agreement.*

In sum, this Court should, upon review under an abuse of discretion standard, overturn the Circuit Court's conclusions because it failed to afford proper weight to important factors when it ordered removal of the termination clause.

2. The Circuit Court's Order removing the termination clause from the 1990 Agreement should be overturned because it violated the Shareholder's contractual intent.

If the Respondent did adequately prove the existence of the 1990 Agreement, the Circuit Court should have relied upon the intent of the Shareholders in giving effect to its purported content. By relying only on the assertions offered by the Respondent at trial, the Circuit Court's Order negated a cardinal rule in contract interpretation—that where ambiguity in an agreement exists, it is imperative that the court give deference to the parties' intent. Thus, the Order should be vacated because the Circuit Court abused its discretion by not considering the Shareholder's intent as an important factor.

Generally, an abstract distinction exists between the terms "construction" and "interpretation." Many times these terms are used interchangeably. Though often exchanged, the terms have independent significance. Interpretation of a contract is usually meant to describe the true sense of the language therein. *See generally Compania De Navegacion Interior, S.A. v. Fireman's Ins. Co.*, 277 U.S. 66; 48 S. Ct. 459 (1928) (interpreting a contract for marine insurance, the terms "seaworthiness" and "perils of the sea" vary with the circumstances and the exceptional features of the risk known to both parties.) and *United States v. Farenholt*, 206 U.S. 226; 27 S. Ct. 629 (1908) ("a court is not always confined to the written words of a statute; construction is to be exercised as well as interpretation."). Construction, on the other hand is meant to describe the contract's legal effect. *See* 17A Am Jur 2d Contracts § 336, not. 75.

The Circuit Court has done both. First, it interpreted the 1990 Agreement as having excised both the clause requiring insurance and the clause providing termination as the consequence for allowing the insurance to lapse. This, the court concluded, was the true meaning of the words. *Appendix pages 531-532, Amended Order.*

The Court also construed the legal effect of the Agreements. The court ordered that the 1990 Agreement was valid and binding on the estate. *Id.* The Circuit Court did not, however, interpret or construe the contract in accord with the contracting parties intent.

"Contracts should, on the one hand, neither be so narrowly or technically construed as to frustrate their obvious design nor, on the other hand, be so loosely or inartificially construed as to relieve the obligor from liability fairly within the scope or spirit of their terms." 17A Am Jur 2d Contracts § 336, not. 81. "In the construction or interpretation of contracts, the primary purpose and guideline, or the controlling factor, and indeed the very foundation of all the rules for such construction or interpretation, is the intention of the parties." 17A Am Jur 2d Contracts § 350, not. 28. "Accordingly, the fundamental and cardinal rule in construction or interpretation of contracts is that the intention of the parties is to be ascertained and effect is to be given to that intention if it can be done consistently with legal principles." 17A Am Jur 2d Contracts § 350, not. 30. See also, *Pierpoint v. Pierpoint*, 71 W. Va. 431; 76 S.E. 848 (W.Va. 1912) (The Court construed the written terms of a promissory note in accord with it thought that the parties probably intended at the time of the contract's execution.)

Furthermore, the words of a contract will be considered as a whole, not piecemeal as a court deems convenient, in light of the purpose for which the document

was drafted. "The legitimate purpose of all construction of instruments in writing is to ascertain the intention of the party or parties making the same, and, when this is determined, effect will be given thereto, unless to do so will violate some rule of property." *Gibney v. Fitzsimmons*, 45 W. Va. 334, 342; 32 S.E. 189, 192 (W.Va. 1898). *See also Toothman v. Courtney*, 62 W. Va. 167, 172-173; 58 S.E. 915, 917 (W.Va. 1907) (Deciding the lawful construction of a ambiguous deed, this Court stated, "the circumstances connected with the transaction and the situation of the parties may be considered in arriving at their intent.).

The 1982 Agreement provides both a map to guide the Shareholders and the Corporation to amicable resolution and a vehicle (insurance) to get there. *See Appendix pages 197-205, Plaintiff's Exhibit 2, 1982 Stock Purchase Agreement.* The buy-sell agreement was, according to its terms and the testimony produced at trial, designed to keep the assets in the family. The Respondent, Sam Bossio, and Emilia Bossio are family, regardless of the Respondents animus towards the others. Eliminating the possibility that the Corporation would fall into the hands of the Respondent's spouse or Sam Bossio's spouse was the intent of the Shareholders. Thus, without a vehicle, the map becomes useless. The construction provided by the Circuit Court contradicts this intention.

Accordingly, the Circuit Court's Order was a product of its abuse of discretion. The Circuit Court should have considered the Shareholder's intent when it construed the missing agreement. Even if the Respondent argues that he did produce evidence that the insurance was made optional, he did not produce evidence that showed that failure to maintain insurance, optional or not, would have terminated the agreement. If

the Respondent were to argue that a construction that invalidates an agreement is improper, that argument should fail because termination of the agreement was part of the agreement. Therefore, this Court should hold that the Circuit Court abused its discretion because it did not appropriately consider important factors, such as the Shareholders' intent, and reverse the Circuit Court's ruling.

VIII. CONCLUSION

The Petitioner, the Estate of Luigi Bossio a.k.a. Louis Bossio, respectfully requests that this Court reverse the Monongalia County Circuit Court's conclusion of law finding that either the 1982 Agreement or the 1990 Agreement existed, that all the Shareholders intended to execute an agreement, that the agreement is binding on the Estate, and that the termination requirement was removed in 1990 and remand for further proceedings if appropriate. The conclusions should be overturned because the Circuit Court (a) applied the wrong evidentiary standard, (b) failed to adequately consider pertinent facts, (c) misconstrued the artificially created agreement, and (d) could not have properly concluded that either agreement existed because there was not enough evidence presented to support that conclusion.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Estate of Luigi Bossio, also known as Louis Bossio, Defendant Below, Petitioner

vs.) No. 14-1328

Bernard V. Bossio, Plaintiff Below, Respondent

AND

Sam Bossio, Defendant Below, Petitioner

vs.) No. 14-1329

Bernard V. Bossio, Plaintiff Below, Respondent

CERTIFICATE OF SERVICE

I, David M. Jecklin, certify that on April 2, 2015, I served a copy of The Estate of *Luigi Bossio, a.k.a. Louis Bossio Petitioner's Brief* by facsimile and mailing a copy by United States First Class Mail, postage prepaid, addressed to:

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